The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Marvin PHILLIPS, Defendant and Appellant.

Cr. 8887.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1965.

Rehearing Denied March 25, 1965.

Hearing Granted April 21, 1965.

Defendant was convicted in the Superior Court of Los Angeles County, Mark Brandler, J., of murder, and he appealed from the judgment and from orders denying new trial and denying probation. The District Court of Appeal, Roth, P. J., held that under evidence that removal of cancerous eye was necessary to save child's life, but chiropractor with reckless and wanton cupidity, induced parents to forego operation and submit child to chiropractor's treatment, by knowingly false representations that he could cure cancer, and thus child's life was shortened, elements of first-degree murder were present or evidence could have been weighed and accepted as showing second-degree murder or manslaughter; but instruction on felony murder rule was prejudicially erroneous as binding jury by conclusive presumption if jury found felony of theft by false pretense.

Judgment reversed and appeals from orders dismissed.

1. Homicide ⇐18(1)

The doctrine of felony murder is the law of California, and unlawful killing proximately resulting from perpetration of a felony not enumerated in statute defining first-degree murder is murder in second degree if felony itself is inherently dangerous to human life. West's Ann.Pen.Code, § 189.

2. Homicide ⇐18(1)

The felony murder doctrine originated at common law and was confined to violent felonies enumerated in statute defining first-degree murder, but since it was based on theory that it was immaterial whether man was hanged for one felony or another, abolition of death penalty for felonies generally has resulted in limitation of application of the doctrine. West's Ann.Pen. Code, § 189.

3. Homicide ⇐18(1)

The common law rule of felony murder, as adopted in California, is qualified by holding that felonious act must be malum in se. West's Ann.Pen.Code, § 189.

4. Constitutional Law ⇐70(1)

Though criticism of felony murder doctrine is sound in principle, reform is within province of Legislature and not courts.

5. Homicide ⇐13

The question that should be before trier of fact in any homicide where malice is to be implied is whether wrongdoer in commission of unlawful act knows or should as reasonable man know that natural consequences of the unlawful act are dangerous to human life and may result in death.

6. Homicide ⇐18(1)

The felony murder rule relieves prosecution of its burden of proving malice where the act or underlying felony, generally malum in se, is pregnant with danger in itself.

7. Homicide ⇐18(1), 22(1), 289, 340(1)

Under evidence that removal of cancerous eye was necessary to save child's life, but chiropractor with reckless and wanton cupidity, induced parents to forego opera-

tion and submit child to chiropractor's treatment, by knowingly false representations that he could cure cancer, and thus child's life was shortened, elements of first-degree murder were present or evidence could have been weighed and accepted as showing second-degree murder or manslaughter; but instruction on felony murder rule was prejudicially erroneous as binding jury by conclusive presumption if jury found felony of theft by false pretense. West's Ann. Pen.Code, §§ 187, 189.

8. Homicide ⇐18(1)

Chiropractor's guilt of homicide when, with reckless and wanton cupidity, he induced parents to forego necessary surgical operation for child and submit child to chiropractor's treatment, would have to rest on finding from the evidence intent to kill with premeditation and malice aforethought, or with malice aforethought alone, or through wanton negligence, without the aid of a legal fiction as to his intent, imposed upon and added to the evidence by felony murder rule on theory that obtaining money by false pretenses resulted in death. West's Ann.Health & Safety Code, § 1714.

9. Homicide ⇐18(1)

The felony murder rule does not extend to a non-dangerous felony such as theft by taking money under false pretenses. West's Ann.Health & Safety Code, § 1714.

10. Criminal Law ⇐700, 701

Trial counsel have right to use strategy and tactics in trial but such strategy and tactics cannot invade rights of the state.

11. Criminal Law ⇐699
Trial ⇐106

The right of adverse parties to indulge strategy and tactics in any case, and especially in a criminal case, is subject to court's inherent power to prevent abuse of fundamental rights of litigants, to seek the truth and to see that justice is done.

12. Judges ⇐24

A judge is not merely a passive instrument of parties but has duty of his own, independent of them, to investigate the truth

13. Indictment and Information ⇐132(1)

Where defense counsel inquired at voir dire examination whether first-degree murder or request for capital punishment was involved as affecting voir dire, and district attorney stated opinion that facts would support second-degree murder conviction only and voir dire on capital punishment was not necessary, trial court had right to believe that district attorney's representation was sincerely and responsibly made, and to proceed on reduced charge of second-degree murder in view of election made in open court in presence of adverse counsel, no evidence being before court.

14. Homicide ⇐309(4), 341

Where evidence in second-degree murder prosecution showed possibility of manslaughter conviction, failure to instruct on manslaughter despite defendant's objection for tactical reasons to such instruction was an abuse of discretion and prejudicial error. West's Ann.Pen.Code, § 1159.

15. Criminal Law ⇐795(1)

Court has duty to instruct on included crime if there is evidence, no matter how weak or incredible, that defendant is guilty only of a lesser offense.

16. Criminal Law ⇐633(1)

The state in a criminal case is a party to the action and has an overriding public interest which must be safeguarded by court, but such interest is not to convict or punish but to expose all evidence and deal justly with defendant, and just acquittal is as much a victory for the state as a finding of guilt.

17. Criminal Law ⇐795(1)

The state may not be a party voluntarily or involuntarily to a gamble which will either free a defendant or punish him for crime in excess of that which evidence warrants when there is a lesser crime for which he could be convicted on the evidence and under the law.

18. Criminal Law ⇐790

To properly decide a case, jury should have all the law applicable to the evidence taken at the trial

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Stanley Mosk, Thomas C. Lynch, Attys. Gen., William E. James, Asst. Atty. Gen., William L. Zessar, Deputy Atty. Gen., William B. McKesson, Dist. Atty., County of Los Angeles, John W. Miner, Deputy Dist. Atty., for respondent.

Burton Marks, Beverly Hills, amicus curiæ.

ROTH, Presiding Justice.

Appellant, Dr. Marvin Phillips, a doctor of chiropractic, has been licensed to practice his profession since 1958, in which year he was graduated from the Los Angeles School of Chiropractic. On February 27, 1962, he was indicted for violation of Penal Code, § 187, charging that he did willfully, unlawfully and feloniously and with malice aforethought murder Linda Epping, a human being, and after a protracted trial, he was convicted by a jury of second degree murder. This appeal is from the judgment entered on the verdict.

Linda was the daughter of Herman and Helen Epping. She was in the eighth year of her life at the time of her death in December of 1961. The medical evidence is undisputed that Linda died as the result of an extremely dangerous form of cancer known as rhabdomyosarcoma of the eye. The murder conviction is based on the conclusion of the jury that appellant with malice aforethought murdered Linda and the uncontradicted medical evidence is that there is a reasonable medical certainty that he did so by shortening her life.

During the month of June, 1961, Linda's mother observed a slight swelling over Linda's left eye. She consulted two medical doctors on separate occasions, and one of them recommended that Linda be taken to Dr. Straatsma, an opthomologist at UCLA. Linda was first seen by Dr. Straatsma on July 10, 1961, and on July 17, 1961, she was admitted to the hospital at UCLA in severe pain. An exploratory operation was performed and a resulting biopsy specimen established that the child had rhabdomyosarcoma of the eye. An examination by a pediatrician at the UCLA hospital indicated that Linda was physically sound in all other respects. Two days later Dr. Straatsma recommended to the Eppings that an exteneration of the orbit (removal of the eye socket) be performed as quickly as possible if Linda's life was to be saved, as the form of cancer diagnosed was dangerous and fast growing. The Eppings understood Dr. Straatsma to make some reference to surrounding tissue and concluded that surgery would include removal of a portion of the brain. They were told that their written consent to the operation was necessary.

The Eppings were loath to give their consent, but prior to noon on July 21, Mr. Epping gave his oral consent. In the afternoon of the same day, and prior to their appointment with the surgeon, the Eppings met Mr. and Mrs. Eaton who were visiting their little girl at the UCLA hospital. Mrs. Eaton told the Eppings that appellant, a practicing chiropractor, had cured their son of a brain tumor. Mrs. Epping phoned appellant forthwith.

In the telephone conversation, Mrs. Epping told appellant of the conversation she had with the Eatons and described to him the diagnosis and the recommendation made in respect of Linda substantially as they are outlined above, and asked appellant if he could help Linda. Appellant represented that he could and added that an operation would not be necessary. Appellant, among other things, said: "It didn't make any difference where the cancer was located on the body, because it was a general disease and it could only be cured by general treatment. It was the toxication of the body and you could only cure it by chemical balancing of the body." Appellant requested Mrs. Epping to call him in ten minutes and cautioned her not to talk to anyone about their conversation. She asked him why. He replied: "Because I'm not supposed to treat cancer." Mrs. Epping again inquired why and asked him what kind of doctor he was.

He said: "I am a chiropractor." Mrs. Epping did return the call and was requested to come to appellant's office that same afternoon with her husband. The Eppings arrived at appellant's office at 3:00 p. m. the same day.

In the intervening period appellant called Doctor Black (a fellow chiropractor). Dr. Black informed appellant that rhabdomyosarcoma was a fatal disease, and that he should not promise Mrs. Epping that he could do anything for Linda.[1]

A two hour interview with the Eppings was had with appellant in his office that afternoon. Appellant reiterated his statement that cancer was a general condition that could not be cured by an operation. He told the Eppings that if they gave their consent to the operation, the surgeons would kill Linda, since UCLA was "an experimental place" and Linda would be used as a "guinea pig". He added that at UCLA "* * * doctors know they won't cure Linda but wanted to experiment and * * * [told us the doctors] get our money at the same time."

It should again be noted at this point that the medical evidence to the effect that the surgery recommended was necessary to prolong Linda's life was uncontradicted.

Appellant asked Mrs. Epping if Mrs. Epping thought she could persuade Linda to take bad tasting medicines and Mrs. Epping replied that she thought she could. The Eppings repeatedly asked during this interview if he was certain he could cure Linda and he " * * * assured us again and again that he could cure Linda * * * [and] * * * he was very positive he often used the word 'absolutely'."[2]

Appellant said it was not necessary to perform a biopsy to detect cancer, and that there was a machine by which this could be done.

It was then decided that Linda would be immediately taken out of the hospital at

1. Appellant's version of this conversation was substantially as follows:
"A. I told him that the mother wanted to talk to me and that I knew that this was a very, very dangerous condition and a fatal condition.
"Q. How did you know that?
"A. Well, because I had done a lot of reading about—in school we have four semesters of pathology and we cover all types of malignancies.
"Q. Did you use Boyd's Pathology in chiropractic college?
"A. Yes, we do.
"Q. Now what did Doctor Black tell you?
"A. Well, he told me that he could not tell me what to do in this case. He said, 'Certainly, whatever you do, you know that this case—that there is no cure for this case, that this is a fatal case, and do not promise this mother that you can do anything for this girl.'
"Q. What else?
"A. Well, this is all that Doctor Black told me. I told him, however, that I felt I should talk to her and perhaps attempt to, oh, ease her mind somewhat because she was very, very distraught and she was under a great deal of pressure.
"Q. Did you talk to him about any food nutrients?
"* * *.
"Q. What did Doctor Black say in this regard?
"A. He mentioned a case, his mother, specifically, and he told me that by giving her the dietary supplements he had built up her resistance of her body and put into the body that which the body needed to help her to prolong her life.
"Q. Did she have a cancer?
"A. Yes, she did.
"Q. Well, then, doctor, you were treating cancer, weren't you?
"* * *.
"Q. I want you to tell the ladies and gentlemen of the jury, then, if you intended to treat cancer?
"A. No, I didn't.
"Q. What did you intend to do?
"A. I wanted to put everything I could that the body needed—I wanted to give Linda everything I possibly could and everything her body needed to help prolong her life.
"* * *."

2. § 1714 of the Health and Safety Code sets forth: "It is a misdemeanor for any person willfully and falsely to represent a device, substance or treatment as effective to arrest or cure cancer. Nothing in this section shall abridge the existent rights of the press."

UCLA. Linda was taken out of the UCLA hospital and brought to appellant's office the next day.

Before the interview herein outlined was closed, the discussion turned to the subject of money. Appellant asked for $500 in advance for three months' treatment and told the Eppings that in addition there would be between $200 and $300 a month for medicines that Linda would have to take. Appellant explained that there had to be one month's treatment for every year that the child had had the disease, and he indicated that it was possible that Linda had had this illness for her entire life. In that event it would be necessary for her to be treated for eight months. The Eppings, it is not clear just which of them, said that they did not have the money and would have to borrow it.

The Eppings testified that Linda would not have been removed from the hospital at UCLA, and they would have permitted the operation to be performed, if it were not for the representations of appellant that he could cure cancer and cure Linda and his statements that UCLA was an experimental place. They testified that they relied on said representations. [3]

On the following day Mrs. Epping took Linda to Dr. Phillips' office for Linda's first visit. Out of the presence of the parents, appellant made a physical examination of Linda and a blood and urine analysis. From the tests and his examination, he told Mrs. Epping that "not an organ in Linda's body was functioning right. Her kidneys are very bad, she was very anemic, she had a very bad thyroid condition—several other things." This evoked the comment from Mrs. Epping that the pediatrician at UCLA had told them that Linda was in very good general condition. To this the appellant rejoined: "They would tell you anything to get your consent to this operation."

Appellant commenced his course of treatment the following day, which consisted of daily visits to appellant's office from July 22 through August 12, except Sundays. During each visit there was a spinal manipulation and the application of salve to Linda's left eye. There was also some manipulation of the feet. From the beginning, as part of the treatment, Mrs. Epping was required to administer to Linda 124 tablets a day and 150 drops of iodine in water, each hour for 11 to 12 hours of each day. In addition, Mrs. Epping was required to see that Linda drank a quart of water containing two dissolved tablets each morning, then wait for 20 minutes and take more tablets, and then wait a half an hour before eating and to see that Linda sat in a bathtub filled with hot water each night for one half hour, and every other day to see that Linda was given an enema.

During the course of the treatment, Mrs. Epping made complaints to appellant that Linda was getting sick from taking all the pills "also that she would vomit in the morning when she had to take all of this fluid." Appellant would reply "not to worry" and that "Linda would get a lot worse before she got better" and "that he was trying to reach a fever of 103 or 104."

On August 9, 1961, Mrs. Epping received a telephone call from appellant requesting her to come to his office that afternoon to pick up a bottle of medicine which was very important for Linda to have. Linda had already been at the doctor's office that same morning. Mrs. Epping did as the doctor ordered and the doctor delivered to her a bottle which contained vitamin A. The evidence established that two previous items which the doctor was prescribing already supplied Linda with many times the standard adult requirement for vitamin A.

Linda's physical condition deteriorated considerably during the course of the described treatment. The left eye continued

3. Penal Code, § 484 provides: "Every person * * * who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, * * * is guilty of theft."

to swell, and the Eppings discharged appellant on August 13, 1961. The child was not returned to the UCLA hospital although the Eppings were advised by Dr. Brock, an M.D., to return her to the UCLA hospital. The parents tried a Mexican herbal cancer drug known as "yerbamansa" and then sought the help of a Christian Science practitioner. Four and one half months after the Eppings had discharged appellant, Linda died.

Appellant treated Linda for a period of approximately 21 days. During that period of time he told the Eatons that he could cure Linda if Linda's parents would follow his instructions and it is also clear from the record that he told at least two other persons that he could cure cancer.

Dr. Hayes, Dean of the Los Angeles College of Chiropractic, in which college appellant had studied and from which college he graduated, testified that students of that school were not taught a specific cure for cancer and were told that sarcoma could not be cured by manipulation, vitamins or food supplements.

The evidence introduced by respondent above was amply corroborated in all its facets.

Appellant testified that he urged the Eppings to keep Linda at UCLA, not to take her from the hospital, and to listen to the doctors there; that he didn't even know that Linda was to be removed from the hospital until the Eppings called him at approximately 7:00 p.m. on July 21 and told him so, and that at that time "I was upset because—well, I just didn't like to see this, and I told her she made a very grave mistake, I said, 'Mrs. Epping, you should take the child back into the hospital.'" He asserted he did not intend to treat the cancer in Linda and denied that he was treating the cancer. He admitted he charged a fee of $500 and charged extra for vitamins and nutritional supplements and that he made a profit of 100% on each item. In discussing what chiropractors do, appellant made the flat assertion that "we don't cure cancer" and stated that if he had a patient with a malignant tumor, he would refer such patient to a surgeon. Appellant also admitted that "biopsy is the only definitive diagnostic procedure for the detection of cancer."

Appellant's defense thus consisted of his statements that he did not represent he could cure cancer; that he did not intend to treat and did not treat Linda for cancer; that he advised Linda's parents she should be kept in the hospital; that her case needed medical attention; that he could not give this kind of attention; that she needed surgery and should be in the hands of a surgeon, and the most he could do was to build up her body (since he testified that his examination revealed it needed such buildup) with manipulation, dietary treatment, vitamins and food supplements and nutrients, and that he believed sincerely and in good faith that by so doing she would be better able to withstand and recover from surgery and thus he would prolong her life.

The record indicates that the evidence upon which the indictment against appellant was returned and the primary theory although not the exclusive one upon which the prosecution tried the case, was that appellant with felonious intent made false representations to the Eppings to obtain money from them in violation of section 484 of the Penal Code, a felony; that the Eppings in reliance on these representations, took Linda out of the hospital at UCLA and paid appellant money in excess of $700; and that since the medical evidence showed without contradiction that Linda's life was shortened as the proximate result of this conduct on the part of appellant, that appellant independent of other evidence in respect of malice aforethought, did nevertheless as a matter of law, have such malice.

Appellant contends that the extension of the felony murder rule to the type of felony here involved is without authority and unsound in principle.

Respondent contends that the felony murder rule applies to a dangerous felony or one perpetrated in a dangerous way and that the facts in the case at bench clearly

show that appellant *knew* of the danger involved in his conduct.

The answer depends on the scope of the felony murder rule in California.

Among the instructions the court gave, five were directed entirely to the subject of grand theft and its ingredients, and one to the subject of theft by false pretenses. In respect of murder, the court gave instructions 20 and 22 as follows:

"CONCERNING SPECIFIC INTENT

"In the case of certain crimes it is necessary that, in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed.

"Thus in the crime of MURDER, a necessary element is the existence in the mind of the perpetrator of the specific intent to committ—the crime of murder or the specific intent to committ the crime of grand theft which crime the State relies on to constitute the crime of murder and, unless such intent so exists, that crime of murder is not committed."

"* * *.

If the unlawful killing of a human being is done with malice aforethought, but without deliberation and premeditated intent to take life, which is an essential element of first degree murder, then the offense is murder in the second degree. In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree:

"(1) If the killing proximately results from an unlawful act, the natural consequences of which are dangerous to life, which act is deliberately performed by a person who *knows* that his conduct endangers the life of another, or

"(2) If the circumstances proximately causing the killing show an abandoned and malignant heart, or

"(3) If the killing is done in a perpetration or attempt to perpetrate a felony such as Grand Theft. If a death occurs in the perpetration of a course of conduct amounting to Grand Theft, which course of conduct is a proximate cause of the unlawful killing of a human being, such course of conduct constitutes murder in the second degree, *even though death was not intended.*" [4] (Emphasis added.)

In respect of malice, the court's instruction number 27 said in pertinent part:

"Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured."

[1] It is clear from the authorities that the doctrine of felony murder although abandoned in England where it originated, and although the subject of much critical discussion by the courts and professors of law, is the law of this State. Our courts have held that an unlawful killing proximately resulting from the perpetration of a felony not enumerated in section 189 of the Penal Code,[5] is murder in the second degree if the felony itself is inherently dangerous to human life. (People v. Ford, 60 Cal.2d 772, 795, 36 Cal.Rptr. 620, 388 P.2d 892 (dicta); People v. Poindexter, 51 Cal.2d 142, 149, 330 P.2d 763 (administering narcotics to a minor); People v. Powell, 34

4. "The thing done having proceeded from a corrupt mind, is to be viewed the same, whether the corruption is of one particular form or another * * *." (People v. Doyell, 48 Cal. 85, 94.)

5. Penal Code, § 189 sets out the doctrine as follows: "All murder * * * which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree; and all other kinds of murders are of the second degree."
"Murder" within the meaning of § 189 means an act which constituted murder at common law. (People v. Sanchez, 24 Cal. 17; 1 Wharton's Criminal Law 747).

Cal.2d 196, 205, 208 P.2d 974 (abortion); People v. Olsen, 80 Cal. 122, 22 P. 125 (rustling); People v. Doyell, 48 Cal. 85 (killing in defense of possession); People v. Foren, 25 Cal. 361 (defendant and deceased both drunk at the time homicide committed); People v. Pulley, 225 A.C.A. 473, 480, 37 Cal.Rptr. 376 (stolen automobile); People v. Jackson, 217 Cal.App.2d 161, 31 Cal.Rptr. 356 (abortion); People v. Bauman, 39 Cal.App.2d 587, 103 P.2d 1020, (drunk rolling); People v. Wallace, 2 Cal. App. 2d 238, 37 P.2d 1053 (driving while drunk—hit-and-run); People v. Hubbard, 64 Cal.App. 27, 220 P. 315 (accidental killing defending possession).

The cases cited illustrate that the felony murder doctrine has been applied only to a killing committed or proximately resulting from the commission of a felony dangerous to human life. Professor Perkins notes that a felony may not be dangerous in itself to human life but actually may be committed with such violence as to endanger human life. (Perkins, A Re-Examination of Malice-aforethought, 43 Yale L.J. 537, 561.) Perkins states what he considers to be the modern rule as follows: "* * * Homicide is murder if the death ensues in consequence of the perpetration or attempted perpetration of some other felony unless such other felony was not dangerous of itself and the method of its perpetration or attempt did not appear to involve any appreciable human risk. To this may be added the explanation, previously suggested, that the danger here referred to may fall considerably short of a plain and strong likelihood that death or great bodily injury will result, but must not be so remote that no reasonable man would have taken it into consideration." (Perkins, Criminal Law, 36; see, Pike, What is Second Degree Murder in California, 9 So.Calif. Law Rev. 112, 118; People v. Bauman, 39 Cal.App. 2d 587,103 P.2d 1020; People v. Pulley, 225 A.C.A. 473, 479, 37 Cal.Rptr. 376.)

We find no case in any jurisdiction and we have been cited to none in which a death resulting wholly from the felonious perpetration of a fraud[6] has been embraced in the felony murder doctrine.[7]

[2] The felony murder doctrine originated at common law and was confined to the violent felonies enumerated in Penal Code, § 189. This code section adds Penal Code, § 288 to the common law felonies. An exhaustive discussion of the doctrine as it was exercised and applied in England is to be found in Powers v. Commonwealth, 110 Ky. 386, 61 S.W. 735, 53 L.R.A. 245. The court in that case commencing at page 741 says, in part:

"* * * In the application of this doctrine, a distinction was made resting upon the grade of the intended offense. If the crime intended was a felony, as at common law practically all felonies were punishable with death, * * * the felonious intent of the intended crime was imputed to the committed act, * * *; for it was considered immaterial whether a man was hanged for one felony or another. * * * [A]nd so it was considered by the judges as making no difference whether the committed act was the one intended. * * * But as with advancing civilization the savage cruelty of the ancient English common law, under which some hundreds of offenses were punished with death, became softened by statutory amendment, this doctrine, even in Great Britain, became modified. * * *"

However, with the abolition of the death penalty as punishment for all felonies

6. At common law taking money under false pretenses was a civil trespass and not a crime. (Perkins, Criminal Law 240.) "If [a killing] be in prosecution of a felonious intent or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter." (4 Blackstone's Commentaries 192, 193.)

7. Respondent in its brief says: "This is the first case of murder by false pretenses to reach an appellate court in the seven hundred years of recorded Anglo-American Law. What amazes is not the novelty of the case, but that it is novel."

the common law courts began to limit the application of the felony murder rule. (Wechsler & Michael, "A Rationale of the Law of Homicide," 37 Col.Law Rev. 701, p. 713.) The end product of this evolution in England, prior to the abolition of the felony murder rule in 1957,[8] was that the rule only applied to a violent felony committed in a violent manner. (Moreland, Law of Homicide, 47; Director of Public Prosecutions v. Beard (1920) App.Cas. 479: Regina v. Whitemarsh, 62 Just. P. 711; Reg. v. Horsey, 3 Fost. & Fin. 287.) "It appears that the [English] court considers that an act of violence done in the course of and in the furtherance of a felony of violence is an act, objectively speaking, that is so dangerous to human life and safety as to make the actor guilty of murder, if a homicide occurs." (Moreland, supra.) The English courts, prior to 1957, consistently followed this form of the felony murder rule. (Rex v. Jarmain, 2 All.E.R. 613; Reg. v. Betts and Ridley, 144 L.T. 526.)

With the adoption of the English common law in the various jurisdictions in this country, and its modification by statute, the question arose whether this doctrine applied to statutory felonies which were not felonies at common law. As pointed out in Powers, supra: "In some of the jurisdictions it was held without qualification that it did. It may be remarked that, in many of the earlier cases, the attempted offense was abortion; and it may be that the moral turpitude of this offense, * * * had effect in determining the question. * * *" (61 S.W. p. 741.)

In Powers, supra, the court said further (p. 742):

"This doctrine, manifestly, should have no application * * *, except it be qualified by the limitation foreshadowed by Mr. Bishop (1 Bish.New Cr.Law, § 336), 'by requiring the act towards the proposed crime to have a natural tendency to produce the unintended result.' This limitation has been indicated in a number of cases of attempted crime which resulted in the commission of a wrong not intended. * * To illustrate: Under our statute, the removal of a corner stone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellows accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation. * *

"* * * The reason of the rule passing, the rule passed also; * * *. This is upon the wise, just, and humane principle which has enabled the common law to adapt itself to the changing necessities of human society, and has made it, as Burke said, 'an edifice having the principles of growth within itself.' The law, as declared today, is in exact accord with what has been said. It is so stated in the text-books and the cases." (p. 743)

[3] California, in adopting the common law rule qualified the broad rule by holding that the act must be *malum in se*. Thus, in People v. Doyell, supra, 48 Cal. 85, 94, the court stated that "The common law measures an act which is *malum in se*, substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially intended, * * *."[9] (People v. Olsen, 80 Cal. 122, 126, 22 P. 125, cites this case as controlling.)

Subsequent California cases, some of which are cited above, have not deviated from the Doyell concept that the act must be *malum in se*. There is language in some

8. Prevezer, "The English Homicide Act" 57 Col.Law Rev. 624, 633; 5 and 6 Elizabeth 2c. 11)

9. The court pointed out in Doyell, page 94, that "The amendment * * * of the act of 1850 [from which § 189 is derived] 'concerning crimes and punishments,' did not change the law of murder, done in the attempt to commit a felony. It only prescribes a severer punishment where murder is committed [in carrying out an enumerated felony], than where it is committed in carrying out any other felonious design."

of the cases which appears to extend the rule beyond *malum in se* felonies but when the rule is applied it is clear that the court was in each case dealing with a crime inherently dangerous to human life. Thus, in two of the most recent expressions of the rule we find the Supreme Court stating the following: "* * * there was uncontroverted testimony that Callies died from narcotics poisoning, and that taking a shot of heroin was an act dangerous to human life. Death resulting from the commission of a felony such as furnishing, selling or administering of narcotics to a minor constitutes murder of the second degree." (People v. Poindexter, supra, 51 Cal.2d 142, 149, 330 P.2d 763, 767); and "A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen.Code, § 189) constitutes at least second degree murder." (People v. Ford, supra, 60 Cal.2d 772, 795, 36 Cal.Rptr. 620, 635, 388 P.2d 892, 907.)

Notwithstanding the limitations the courts have imposed upon the rule, it continues to remain a sensitive subject with legal scholars.

Witkin, in California Crimes, volume 1, page 284, speaking of the felony murder doctrine, succinctly and bluntly says: "Some writers describe the concept as barbaric, and urge its abolition or strict limitation. (See 1957 A.S. 99 [abolished by English Homicide Act of 1957]; 1958 A.S. 125; Clark and Marshall, p. 594; 71 Harvard L.Rev. 1565; 13 Stanf.L.Rev. 259; Moreland pp. 49, 224.)" (See, Hurst, "The Felony-Murder Doctrine Repudiated," 36 Ky.L.J. 106, 108; Moreland, The Kentucky Felony Willful Murder, 52 Ky.L.J. 585.)

Professor Ludwig has noted that "In the pattern of control of homicidal behavior, the felony murder doctrine functions in its fullest effect only as a rule of treatment; it does not deliniate criminal from non-criminal behavior." Further, that in the majority of cases the rule offers the prosecution only an alternative theory upon which the case may go to the jury. (Ludwig, Foreseeable Death in Felony Murder, 18 Pitt.Law Rev. 51, 52.)

[4] We agree in principle with such criticism, but we recognize that reform is within the province of the Legislature and not the courts. However, in applying the second degree felony murder rule to the case at bench, we must still determine whether the danger to human life (Poindexter, supra; Pulley, supra;) is to be tested by the usual and natural consequences inherently probable in the commission of the particular felony or shall the danger be measured and the felony murder rule extended, as respondent suggests, by all the circumstances in connection with the commission of a specific felony even though there is no inherent probability of danger to life in the specific felony. If the latter is accepted as the test, it has been suggested by numerous commentators that the crime of murder would be shockingly expanded. (Wechsler & Michael, 37 Col.Law Rev. 701; Moreland, Law of Homicide, 222.)

[5, 6] The question that should be before the trier of fact in any homicide where malice is to be implied, is whether a wrongdoer in the commission of an unlawful act knows or should as a reasonable man know that the natural consequences of the unlawful act are dangerous to human life and may result in death. The felony murder rule relieves the prosecution of its burden of proving malice where the act or underlying felony, generally *malum in se*, is pregnant with danger in itself.[10] The obvious analogy is to the doctrine of res ipsa loquitur in the law of torts which also looks to the question of probabilities in

10. Justice Holmes believed that the felony murder rule could be rationalized only on the ground that the Legislature could classify certain felonies as so inherently dangerous as to warrant the conclusive presumption of malice (The Common Law 51).

order to shift the burden of proof. If the theory of the felony murder rule is that the thing itself speaks, then it should apply only when the felony is inherently so dangerous to human life that it screams its warning.

Theft by false pretenses is a crime which requires the consent of the victim. It thus negates the conclusion that physical injury in any form will result as a natural consequence of the act itself. It is true that abortion also requires consent of the victim. The consent to an abortion, however, is a violation of section 275 of the Penal Code and it is therefore no consent. The consent of the victim in theft by false pretenses is to the taking of money and the victim violates no law. In addition, abortion is a crime so dangerous that it is inherently probable that death can result and, finally, abortion has been consistently held to be within the felony murder rule in this country although it was considered murder at common law. (1 Wharton's Criminal Law 677.)

[7] The trial court erred in our opinion by instructing the jury on the felony murder rule. We believe such error was prejudicial. (Calif.Const. Art. VI, § 4½.)

Coldly analyzed in the light of the law of homicide, the evidence of the People in the case at bench shows that a life was shortened by the commission of an unlawful act. Appellant, with calculation, not once but repeatedly made the representation that he could cure cancer and would cure Linda if the parents of Linda would follow his instructions. On his own admission, he knew he could not.

This representation was fortified by the argument made concurrently that UCLA hospital was experimental and that the doctors of that institution were using Linda as a guinea pig.

Appellant, after he first made the representations, called a fellow practitioner who advised him not to represent he could cure cancer and also told him that which he says he already knew, namely that rhabdamyosarcoma was a rare, fast growing and particularly malignant type of cancer. The uncontradicted evidence is that he met Linda's parents at least one hour, and according to his testimony, more than an hour after this conversation with his colleague, and further, it is uncontradicted that Linda was not brought to him until the following day.

Since appellant told Linda's mother on the phone, after she had explained Linda's condition when she first contacted him, that he could cure cancer and repeated this the same afternoon to both Linda's parents, appellant had time within which to make up his mind as to what he was going to say and it is a fair assumption that appellant had settled in his mind generally the course of treatment he would prescribe.

All of the foregoing requires thought and premeditation—there was nothing impulsive in what appellant did.

On the evidence it is fair to assume that appellant was motivated by reckless and wanton cupidity. In a desire to collect a fee and a profit on vitamins and food supplements, he subjected an eight-year old child to a course of treatment susceptible to a construction of torture, knowing that failure to secure proper and needed medical treatment, would shorten her life. The record is singularly free from the testimony of any M.D. or doctor of chiropractic that the treatment prescribed by appellant could do Linda any good or would prolong her life as appellant testified he hoped to do.

In brief, on the evidence all of the elements of first degree murder were present. The evidence showed that there was premeditation, malice aforethought and such a reckless disregard of human life, spawned by cupidity, that the life of a human being was feloniously shortened. If the trial had proceeded on the original charge and if the jury in its sole judgment and beyond a reasonable doubt had come to the conclusion that all of said elements of first degree murder were present, the evidence, in our opinion, would sustain the verdict.

On the same analysis, depending upon how the jury weighed and accepted the evidence, all of the elements of second degree murder or manslaughter were present.

If, however, the jury believed appellant's testimony that he did not urge the Eppings to take Linda from the hospital, made no representations that he could cure cancer, that he did not intend to treat cancer, and that he didn't treat Linda for the cancer, and that he merely represented he could prolong her life by the course of treatment he prescribed, which in and of itself may constitute the crime of theft by false pretense, the jury was nevertheless bound by the conclusive presumption of the felony murder rule. Being so bound the jury could not acquit appellant once the felony and its causal relationship to the child's death was established.

[8] If appellant is guilty of a homicide, he is guilty because the intent to kill with premeditation and malice aforethought, or with malice aforethought alone, or through wanton negligence (cf. People v. Stuart, 47 Cal.2d 167, 302 P.2d 5, 55 A.L.R.2d 705) can be found from the evidence without the aid of a legal fiction as to his intent, imposed upon and added to the evidence by the felony murder rule.

[9] If appellant in the case at bench had charged and collected a total of $200, his acts would have been no less heinous—and there would have been no felony and no felony murder doctrine.[11] It is difficult to believe that a difference of one penny can create a duty requiring the court to instruct the jury that the intent to kill with malice aforethought must be inferred and thus create a murder by a legal fiction, or that the Legislature in accepting the felony murder rule intended such a consequence.

None of the cases cited herein, nor have any others we have examined, extend the felony murder doctrine to the crime of Grand Theft. In the absence of specific authorities requiring us so to do, we have no inclination to extend an archaic and much criticised doctrine, which has been rejected even as to *malum in se* felonies in the country of its origin, to a non-dangerous felony such as theft by taking money under false pretenses. Since the jury was under a mandate to imply malice from the felony murder instruction, it was prejudicial error to have given this instruction in light of evidence that might have otherwise negated a conclusion of malice.

No instructions were given on first degree murder or manslaughter. The case was tried by the State on the theory that if the evidence produced by the State was believed by the jury, it would support "* * * only * * * murder in the second degree." The question arose at the beginning of the trial in this fashion:

"MR. BELLI: Now, on the question * * * bearing on the voir dire of the jury, if there is a request here for voir diring on first degree, or if there is a request for capital punishment in this case, I would like to know about it.

"* * *

"MR. MINER: * * * [T]he case * * * would, in our best and considered opinion, sustain, if the jury accepted our theory and the facts we produce to support it, a conviction only of murder in the second degree.

"We * * * so inform the Court now, * * * that there would be no need to voir dire the jury on the capital punishment issue."

In respect of manslaughter the following proceedings were had:

"THE COURT: 'Manslaughter instructions must be given in a trial for murder if there is evidence, no matter how weak or incredible, that the defendant is guilty only of the lesser offense.'

"* * *.

11. Penal Code, § 487: "When the money * * * taken is of a value exceeding two hundred dollars ($200) * * * then the same shall constitute grand theft."

"MR. BELLI: We don't want a manslaughter instruction.

"THE COURT: You do not want a manslaughter instruction?

"MR. BELLI: No. We do strongly oppose the manslaughter instruction.

"MR. BRODY: Secondly, also your Honor, I don't think there is any evidence—taking the test as laid down by these cases—that there is any evidence of manslaughter, 'How weak or incredible' it may be.[12]

It appears from the record that the election of the District Attorney to go forward on second degree murder was based on an honest appraisal of the evidence he thought he could produce. The court so accepted it. It is also clear from the record that appellant's election was purely tactical "* * * it would be to his benefit tactically to have an instruction only on the subject of second degree murder and no instruction on manslaughter."

[10] Trial counsel have an undoubted right to use strategy and tactics in the trial of an action for which they have assumed responsibility. However, in a criminal case such strategy and tactics cannot invade the rights of the State.

[11] The right of adverse parties to indulge in strategy and tactics in any case, and especially in a criminal case, is subject to the inherent power of the court to prevent the abuse of fundamental rights of litigants, to seek the truth and to see that justice is done.

[12] "A Judge is not placed in that high situation merely as a passive instrument of the parties. He has a duty of his own independent of them, and that duty is to investigate the truth." (Burke in Trial of Warren Hastings, 31 Par.Hist. 348; Bowers, Judicial Discretion of Trial Courts, § 241, p. 269.)

In Gantner v. Gantner, 39 Cal.2d 272, at page 278, 246 P.2d 923 at page 929, the court said "* * * A trial judge is not a mere passive spectator at the trial. 'Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed.' In re Estate of Du Pont, 60 Cal. App.2d 276, 290, 140 P.2d 866, 873, and cases cited therein." (Stansbury: California Trial and Appellate Procedure, Volume I, § 581, p. 622.)

12. The discussion continued throughout many pages of transcript and finally concluded in open court when each of co-counsel separately and appellant on each occasion together with co-counsel separately not only waived but stated they did not want the instruction.

The record discloses the following proceedings had in open court:

"THE COURT: Before we proceed with some further discussion with reference to instructions, Mr. Belli, have you had the opportunity of talking to Dr. Phillips in connection with the subject matter of not giving instructions on the theory of manslaughter?

"MR. BELLI: We shall make a statement on that directly.

"May the record show that in open court, without the presence of the jury, I just advised my client, Dr. Phillips, my opinion that on my theory of the case it would be to his benefit tactically to have an instruction only on the subject of second degree murder and no instruction on manslaughter; and having explained this to Dr. Phillips, Dr. Phillips agrees and acquiesces that there be no instruction requested on manslaughter. Stated conversely, Dr. Phillips does not wish an instruction to be given on the subject of manslaughter, only on the subject of murder.

"Is that correct, Dr. Phillips?

"THE DEFENDANT: That is correct.

"MR. BELLI: And he answers personally that it is correct.

"THE COURT: Additionally, also, that Dr. Phillips does not desire that the Court give a form of verdict to the jury on the theory of guilty or not guilty of manslaughter?

"MR. BELLI: Is that correct, doctor?

"THE DEFENDANT: Correct.

"THE COURT: The doctor answers 'That is correct.'"

When the above took place, Mr. Brody, co-counsel, was not in court. He arrived shortly thereafter and substantially the same proceedings took place.

[13] We are not blind to the fact that appellant could argue although there is nothing in the record to indicate that such an argument was made or suggested to the trial court that the District Attorney elected to proceed on a charge of second degree murder rather than first, for the tactical reason that if he asked too much he might get nothing. However, in the circumstances herein detailed, the trial court had every right to believe as we do that the representation of the District Attorney was sincerely and responsibly made as a sworn public officer and as an officer of the court.

The election of the District Attorney was made in open court in the presence of adverse counsel when the court had no evidence before it and it clearly was not an abuse of discretion for the court to proceed on the reduced charge of second degree murder.

In respect of the manslaughter instruction, however, the court had all the evidence before it,[13] and had a complete perspective of what lesser crimes were necessarily included in the primary charge.

[14] Appellant does not complain of the failure to give the instruction on manslaughter, and we are not here concerned with the question of invited error. We address ourselves to the question because we feel that the omission of the court to give the instruction on manslaughter in spite of appellant's objection to the giving thereof, did amount to an abuse of discretion and was prejudicial error.

[15] The law is clear that the court has the duty to instruct on an included crime[14] if there is evidence, no matter how weak or incredible, that a defendant is guilty only of a lesser offense, as there is a probability that the jury might accept such evidence. (People v. Wade, 53 Cal.2d 322, 334, 1 Cal.Rptr. 683, 348 P.2d 116; People v. Ellis, 137 Cal. App.2d 408, 290 P.2d 266; People v. Lewis, 186 Cal.App.2d 585, 602, 9 Cal.Rptr. 263.)

In Lewis, supra, the court said at page 598, 9 Cal.Rptr. at page 269:

"* * * It has, for example, been held in prosecutions for murder that it is error to fail to give an unrequested instruction on manslaughter where the facts of the case would warrant a verdict of guilt as to such offense." (cf. People v. Henderson, 60 Cal. 2d 482, 35 Cal.Rptr. 77, 386 P.2d 677; People v. Modesto, 59 Cal.2d 722, 31 Cal.Rptr. 225, 382 P.2d 33; People v. Thomas, 25 Cal. 2d 880, 885, 156 P.2d 7.)

Some cases indicate that a defendant may have a choice as to whether an instruction on a lesser included offense shall be submitted to a jury. However, even such cases hold a defendant has no such election in a murder case.

In People v. Roth, 228 A.C.A. 591, 597, 39 Cal.Rptr. 582, 585, the court stated: "It has often been said that the trial court need not instruct on included offenses unless the defendant so requests. (See Witkin, California Criminal Procedure (1963) § 480; Fricke, California Criminal Procedure (6th ed. 1962) p. 349 * * *.)

"In People v. Bailey, 142 Cal. 434, 76 P. 49, the court pointed out that this rule gives the defendant his choice whether lesser offenses will be submitted to the jury. The court said (142 Cal. at p. 436, 76 P. at p. 49): 'The rule as above stated is, upon the whole, not unfavorable to a defendant. If he desires the jury to understand that they are not compelled to either find him guilty of the high crime charged or acquit him entirely, he can ask the court to so inform them. On the other hand, if he thinks that the jury cannot and will not convict him of the crime charged, and must therefore acquit him, his argument to them on that theory is not embarrassed by an interference of the court in

13. Some testimony was taken after the conference in judge's chambers re instructions.

14. Penal Code, § 1159: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

the shape of an instruction that they may find him guilty of some other, and perhaps only slightly lesser, crime than the one charged.'

"An exception to this rule has been expressed in murder cases, where it has been held that the trial judge must instruct on lesser offenses, without request, if the evidence would support conviction of a lesser offense. (People v. Lewis, 186 Cal.App.2d 585, 597, 9 Cal.Rptr. 263. See People v. Wade, 53 Cal.2d 322, 334, 1 Cal.Rptr. 683, 348 P.2d 116; People v. Manzo, 9 Cal.2d 594, 598, 72 P.2d 119; People v. Best, 13 Cal.App.2d 606, 610, 57 P.2d 168.)"

It is conceivable in this case that the jury, after it retired for deliberation, may have requested further or additional instructions, or may even have asked the court specifically if it could find guilt of a lesser included crime. If such an incident had occurred, it is difficult to believe that the court would tell the jury that he had already made an election for them, and that the jury was bound to find guilt on second degree murder or acquit. Such an action at the very least would usurp the function of the jury to decide a question of fact.

[16] The State in a criminal case is a party to the action and has an overriding public interest which must be safeguarded by the court.

[17, 18] This overriding public interest is not to convict or punish anyone. It is to expose all the evidence in respect of the crime charged and to deal justly with a defendant in accordance with the law as applied to the facts found by the court or jury from the evidence. If, after presentation of all the evidence, a jury or judge acquits, such an acquittal is as much a victory for the State as if there is a finding of guilt. The State has fulfilled one of the primary obligations for its existence and has been vindicated by the trial, irrespective of the outcome. This premise does not permit the State to be a party voluntarily or involuntarily to a gamble which will either free a defendant or punish him for the crime in excess of that which the evidence warrants when there is a lesser crime for which he could be convicted on the evidence and under the law, if the gambit were not attempted. To properly decide a case, a jury should have all the law applicable to the evidence taken at the trial. (People v. Thomas, 25 Cal.2d 880, 156 P.2d 7.)

In Thomas, supra, the court said at page 885, 156 P.2d at page 10: "* * * [I]t appears to us that the evidence, while not wholly insufficient as a matter of law to support the adjudication of first degree murder, is ample to sustain a finding that the homicide was manslaughter or murder of the second degree. It was, therefore, incumbent upon the jury to resolve the material conflicts in the evidence, including the divergent inferences, and thereupon to determine the class or degree of the offense. In order to make such determination it was essential that the jury be adequately and accurately informed as to the elements of each of the degrees of murder as well as those pertaining to manslaughter, and as to the burden of proof in relation to them. While it is said that the jury makes the determination of the degree or class of the offense, it is not implied that the jury has any discretion, other than in resolving factual issues, in so classifying the offense. The standard for classification is prescribed by law. The function of the jury is to consider the evidence, find all the material facts, and upon those facts, in the light of a full knowledge of all the elements essential to proper discrimination among the several offenses or degrees of offenses which are included in the charge and which can be deduced from the evidence, to apply the law as written."

In the case at bench, the jury did not have the benefit of all the law applicable to the evidence. The fact that appellant wanted it that way and does not now complain, is of no consequence. As already asserted, the State is not interested in conviction per se, but the very preservation of society requires that a judge, and a jury too, when properly instructed, convict when the finding is that a crime has been committed.

What the jury would have done, if they had not been instructed that they must infer intent to kill with malice aforethought, if they believed from the evidence that the crime of theft by false pretenses had been committed, we do not know, nor do we know what they would have done if the court had given instructions on second degree murder omitting the felony murder doctrine and an additional one on manslaughter.

The appeals from the denial of a new trial and probation are dismissed. The judgment is reversed.

HERNDON and FLEMING, JJ., concur.